

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SAMANTHA REGINA AVERILL-
MARCOGLIESE,

Plaintiff,

v.

FRANK BISIGNANO,
Commissioner of Social Security¹,

Defendant.

Case No. 1:21-cv-00277-SKO

**ORDER GRANTING PLAINTIFF'S
COUNSEL'S MOTION FOR
ATTORNEY'S FEES PURSUANT TO
42 U.S.C. § 406(b)**

(Doc. 23)

/

I. INTRODUCTION

On April 28, 2025, Jonathan O. Pena ("Counsel"), counsel for Plaintiff Samantha Regina Averill-Marcogliese ("Plaintiff"), filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 406(b) ("section 406(b)"). (Doc. 23.) That same day, the Court issued a minute order requiring Plaintiff and the Commissioner to file their responses in opposition or statements of non-opposition to Counsel's motion, if any, in accordance with the Local Rules. (Doc. 25.) Plaintiff and the Commissioner were served with copies of the motion for attorney's fees and the minute order. (Docs. 24, 28.)

¹ On May 6, 2025, Frank Bisignano was appointed the Commissioner of the Social Security Administration. See <https://www.ssa.gov/news/press/releases/2025/#2025-05-07>. He is therefore substituted as the defendant in this action. See 42 U.S.C. § 405(g) (referring to the "Commissioner's Answer"); 20 C.F.R. § 422.210(d) ("the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant").

1 On April 29, 2025, the Commissioner filed a response, indicating that he “neither supports
2 nor opposes counsel’s request for attorney’s fees.” (*See* Doc. 27 at 2, 3.) Plaintiff did not file any
3 objection to the motion by the deadline, and no reply brief was filed. (*See* Docket.)

4 For the reasons set forth below, Counsel’s motion for an award of attorney’s fees is granted
5 in the amount of \$20,700, subject to an offset of \$5,100 in fees already awarded pursuant to the
6 Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), on September 21, 2023 (*see* Doc. 22).

7 II. BACKGROUND

8 Plaintiff brought the underlying action seeking judicial review of a final administrative
9 decision denying her claim for disability benefits under the Social Security Act. (Doc. 1.) The
10 Court reversed the Commissioner’s denial of benefits and remanded the case to the agency for
11 further proceedings. (Doc. 17.) Judgment was entered in favor of Plaintiff and against the Acting
12 Commissioner on June 21, 2023. (Doc. 18.) The parties stipulated to an award of \$5,100 in attorney
13 fees under EAJA, which was entered on September 22, 2023. (Docs. 21, 22.)

14 On April 13, 2025, the Commissioner issued a letter to Plaintiff approving her claim for
15 disability benefits and awarding her \$108,504 in back payments beginning December 2013. (*See*
16 Doc. 23-2.) On April 28, 2025, Counsel filed a motion for attorney’s fees in the amount of \$20,700,
17 which is less than 25% of Plaintiff’s back benefits, with an offset of \$5,100 for EAJA fees already
18 awarded. (Doc. 23) It is Counsel’s motion for attorney’s fees that is currently pending before the
19 Court.

20 III. DISCUSSION

21 Pursuant to the Social Security Act, attorneys may seek a reasonable fee for cases in which
22 they have successfully represented social security claimants. Section 406(b) provides the following:

23 Whenever a court renders a judgment favorable to a claimant under this subchapter
24 who was represented before the court by an attorney, the court may determine and
25 allow as part of its judgment a reasonable fee for such representation, *not in excess*
26 *of 25 percent of the total of the past-due benefits to which the claimant is entitled by*
27 *reason of such judgment*, and the Commissioner of Social Security may . . . certify
the amount of such fee for payment to such attorney out of, and not in addition to,
the amount of such past-due benefits

28 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting

1 provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits
2 awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142, 1147
3 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). The Acting
4 Commissioner has standing to challenge the award, despite that the section 406(b) attorney’s fee
5 award is not paid by the government. *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d
6 324, 328 (4th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807. The goal of
7 fee awards under section 406(b) is to provide adequate incentive to represent claimants while
8 ensuring that the usually meager disability benefits received are not greatly depleted. *Cotter v.*
9 *Bowen*, 879 F.2d 359, 365 (8th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at
10 807.

11 The 25% maximum fee is not an automatic entitlement, and courts are required to ensure
12 that the requested fee is reasonable. *Gisbrecht*, 535 U.S. at 808–09 (Section 406(b) does not displace
13 contingent-fee agreements within the statutory ceiling; instead, section 406(b) instructs courts to
14 review for reasonableness fees yielded by those agreements). “Within the 25 percent boundary . . .
15 the attorney for the successful claimant must show that the fee sought is reasonable for the services
16 rendered.” *Id.* at 807; *see also Crawford*, 586 F.3d at 1148 (holding that section 406(b) “does not
17 specify how courts should determine whether a requested fee is reasonable” but “provides only that
18 the fee must not exceed 25% of the past-due benefits awarded”).

19 Generally, “a district court charged with determining a reasonable fee award under
20 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee arrangements,’ . . . ‘looking
21 first to the contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586 F.3d at
22 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has identified
23 several factors that may be considered in determining whether a fee award under a contingent-fee
24 agreement is unreasonable and therefore subject to reduction by the court: (1) the character of the
25 representation; (2) the results achieved by the representative; (3) whether the attorney engaged in
26 dilatory conduct in order to increase the accrued amount of past-due benefits; (4) whether the
27 benefits are large in comparison to the amount of time counsel spent on the case; and (5) the
28 attorney’s record of hours worked and counsel’s regular hourly billing charge for non-contingent

1 cases. *Id.* (citing *Gisbrecht*, 535 U.S. at 807–08).

2 Here, the fee agreement between Plaintiff and Counsel, signed by both parties, provides:

3 I agree to pay my attorney 25% of Past Due Benefits/Retroactive benefits
4 AWARDED (pre-off set) to me and my family (this includes any auxiliary
5 beneficiaries) resulting from my disability claim at the time benefits are awarded.

6 [. . .]

7 It is possible that I will not pay any attorney fee out of my past-due benefits for my
8 attorney's work on my behalf in court, but rather my attorney will receive the EAJA
9 award as his or her sole compensation for representing me in court. However, my
10 attorney has the right under this contract to ask the court to award as much as 25%
of my past-due benefits for representing me in court. If the court awards an attorney
fee out of my past-due benefits and also awards an EAJA fee for that same work,
my attorney must refund to me the smaller fee.

11 (Doc. 23-3 (signed October 30, 2020).)

12 The Court has considered the character of Counsel's representation of Plaintiff and the good
13 results achieved by Counsel, which included an award of benefits. Counsel spent 23 hours
14 representing Plaintiff, ultimately gaining a favorable decision in that the Commissioner's decision
15 was reversed and remanded to the agency for reconsideration. (Doc. 23 at 3, 5; Doc. 23-4 (time
16 sheets accounting for 23 attorney hours spent representing Plaintiff before this Court).) There is no
17 indication that a reduction of the award is warranted due to any substandard performance by
18 Counsel, as Counsel secured a successful result for Plaintiff. There is also no evidence that counsel
19 engaged in any dilatory conduct resulting in delay.

20 Although the accepted range in the Fresno Division for attorneys like Counsel with ten to
21 twenty years of experience (*see* Doc. 23 at 8) is between \$250 and \$325 per hour in non-contingency
22 cases, *see Webb v. Cnty. of Stanislaus*, No. 1:19-cv-01716-DAD-EPG, 2022 WL 446050, at *6 (E.D.
23 Cal. Feb. 14, 2022), here the effective hourly rate requested equals \$900 per hour. (*See* Doc. 23 at
24 9; *see also* Doc. 27 at 2.) This hourly rate is not excessive when compared to what the Ninth Circuit
25 has approved in cases involving Social Security contingency fee arrangements. *See Crawford*, 586
26 F.3d 1142, 1153 (9th Cir. 2009) (explaining that the majority opinion found reasonable effective
27 hourly rates equaling \$519, \$875, and \$902) (J. Clifton, concurring in part and dissenting in part);
28 *see also Thomas v. Colvin*, No. 1:11-cv-01291-SKO, 2015 WL 1529331, at *2–3 (E.D. Cal. Apr. 3,

2015) (upholding an effective hourly rate of \$1,093.22 for 40.8 hours of work); *Jamieson v. Astrue*, No. 1:09-cv-0490-LJO-DLB, 2011 WL 587096, at *2 (E.D. Cal. Feb. 9, 2011) (upholding an effective hourly rate of \$1,169.49 for 29.5 hours of work); *Palos v. Colvin*, No. CV 15-04261-DTB, 2016 WL 5110243, at *2 (C.D. Cal. Sept. 20, 2016) (upholding an effective hourly rate of \$1,546.39 for 9.7 hours of work); *Villa v. Astrue*, No. CIV-S-06-0846-GGH, 2010 WL 118454, at *1–2 (E.D. Cal. Jan. 7, 2010) (approving section 406(b) fees exceeding \$1,000 per hour for 10.4 hours of work, and noting that “[r]educing § 406(b) fees after *Crawford* is a dicey business”). Further, attorney’s fees in the amount of \$20,700 do not exceed—and are in fact less than—25% of the past-due benefits awarded and are not excessive in relation to the past-due award. *See generally Ortega v. Comm’r of Soc. Sec.*, No. 1:12-cv-01030-AWI-SAB, 2015 WL 5021646, at *3 (E.D. Cal. Aug. 21, 2015) (granting petition for an award of attorney’s fees pursuant to section 406(b) in the amount of \$24,350.00); *Thomas*, 2015 WL 1529331, at *3 (granting petition for an award of attorney’s fees pursuant to section 406(b) in the amount of \$44,603.50); *Boyle v. Colvin*, No. 1:12-cv-00954-SMS, 2013 WL 6712552, at *2 (E.D. Cal. Dec. 19, 2013) (granting petition for an award of attorney’s fees pursuant to section 406(b) in the amount of \$20,577.57); *Jamieson*, 2011 WL 587096, at *2 (recommending an award of attorney’s fees pursuant to section 406(b) in the amount of \$34,500).

In making this determination, the Court recognizes the contingent-fee nature of this case and Counsel’s assumption of risk in agreeing to represent Plaintiff under such terms. “District courts generally have been deferential to the terms of contingency fee contracts in § 406(b) cases.” *Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003) (“Because attorneys like Mr. Sackett contend with a substantial risk of loss in Title II cases, an effective hourly rate of only \$450 in successful cases does not provide a basis for this court to lower the fee to avoid a ‘windfall.’” (quoting *Gisbrecht*, 535 U.S. at 807)). Attorneys who agree to represent claimants pursuant to a contingent fee agreement assume the risk of receiving no compensation for their time and effort if the action does not succeed. *Id.* Here, Counsel accepted substantial risk of loss in representing Plaintiff, whose application had already been denied at the administrative level. Plaintiff agreed to the contingent fee. (See Doc. 23-3.) Working efficiently and effectively, Counsel secured a remand, and ultimately, the award of substantial benefits to Plaintiff. (See Docs. 17, 23-2.)

1 An award of attorney's fees in the amount of \$20,700 is, therefore, appropriate. An award
2 fees, however, must be offset by any prior award of attorney's fees granted under the EAJA. 28
3 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796. As Plaintiff was previously awarded \$5,100 in fees
4 pursuant to the EAJA, Counsel shall refund this amount to Plaintiff.

5 **IV. CONCLUSION AND ORDER**

6 For the reasons stated above, the Court concludes that the fees sought by Counsel pursuant
7 to section 406(b) are reasonable. Accordingly, IT IS ORDERED that:

8 1. Counsel's motion for an award of attorney's fees pursuant to 42 U.S.C. § 406(b) in
9 the amount of \$20,700 (Doc. 23) is granted;

10 2. Counsel shall refund to Plaintiff \$5,100 of the fees awarded as an offset for the EAJA
11 fees previously awarded pursuant to 28 U.S.C. § 2412(d) (Doc. 22); and

12 3. Counsel for Plaintiff shall file on the Court's docket proof of service of this order
13 upon Plaintiff at her current or last known address.

14
15 IT IS SO ORDERED.

16 Dated: May 28, 2025

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE